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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON  
(HONORABLE FRED VAN SICKLE)

UNITED STATES OF AMERICA, )

Plaintiff, )

vs. )

MAURICIO TEJEDA, )

Defendant. )

CR-13-0167-FVS

Notice of Review of PSR and  
Sentencing Memo

**I. Notice of review of PSR**

Undersigned counsel has reviewed the PSR with Mr. Tejeda. Mr. Tejeda has no objections to the PSR.

**II. The sentence agreed upon in the plea agreement is sufficient and no longer than necessary**

Mr. Tejeda respectfully requests that the Court follow the Rule 11(c)(1)(c) plea agreement in all respects. While the agreed-upon sentence is below that set forth in the guidelines, it is appropriate under the factors set forth in 18 U.S.C. § 3553(a).

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1           **A.     The Sentencing Guidelines are advisory only**

2           This Court has the discretion to impose a sentence which is reasonable in light  
3 of the factors set forth in 18 U.S.C § 3553(a) in addition to consideration of the  
4 applicable Guideline range. *See, United States v. Booker*, 543 U.S. 220 (2005). The  
5 Court is guided by the language of 18 U.S.C. § 3553(a) that a sentence should be  
6 sufficient, but not greater than necessary to comply with the purposes set forth in the  
7 rest of the section.

8           The Sentencing Reform Act requires judges to consider the Guidelines  
9 “sentencing range established for...the applicable category of offense committed by  
10 the applicable category of defendant as set forth in the guideline,” § 3553(a)(4), the  
11 pertinent Sentencing Commission policy statements, the need to avoid unwarranted  
12 sentencing disparities, and the need to provide restitution to victims, §§ 3553(a)(1),  
13 (3), (5)-(7). And the Act nonetheless requires judges to impose sentences that reflect  
14 the seriousness of the offense, promote respect for the law, provide just punishment,  
15 afford adequate deterrence, protect the public, and effectively provide the defendant  
16 with needed educational or vocational training and medical care. § 3553(a)(2).

17           In *Rita v. United States*, the United States Supreme Court revisited the *Booker*  
18 decision with regards to whether the Sentencing Guidelines should be presumed  
19 reasonable. 551 U.S. 338 (2007). The Court held that a court of appeals may apply  
20 a presumption of reasonableness to a district court sentence that reflects a proper  
21 application of the Sentencing Guidelines. *Rita*, 551 U.S. at 347-349. In its holding,  
22 the Court considered that normally the sentencing judge will consider the reasons  
23

1 articulated in Section 3553(a); and that the Sentencing Guideline Commission has  
2 also taken into account the Section 3553(a) factors in designing the guidelines. *Id.*

3       However, the Court also noted that the presumption of reasonableness is an  
4 appellate presumption: the sentencing court does not enjoy the benefit of a legal  
5 presumption that the Guidelines sentence should apply. *Id.* The sentencing court  
6 will hear arguments by the parties that the Guidelines sentence should not apply,  
7 perhaps because the case falls outside the “heartland” to which the Commission  
8 intends individual Guidelines to apply or perhaps because the guidelines sentence  
9 itself fails properly to reflect section 3553(a) considerations, or perhaps because the  
10 case warrants a different sentence regardless. *Id.* The appellate presumption of  
11 reasonableness is based upon the general assumption that the guidelines are the  
12 product of careful study based upon extensive empirical evidence. *Id.* However, as  
13 discussed *infra*, not all guidelines are tied to this empirical evidence. *Gall v. United*  
14 *States*, 552 U.S. 38, 45 n.2 (2007). The Supreme Court has further held that a  
15 district court can sentence a person below an advisory guideline range based solely  
16 on policy disagreements with the guidelines when the guideline fails to embody an  
17 empirical approach. *See, e.g., Kimbrough v. United States*, 552 U.S. 85, 108-111  
18 (2007).

19  
20       **B.     The Child Pornography Guidelines Are Not the Result of Careful**  
21       **Study and Consideration**

22       Courts have long recognized the crucial role that the Sentencing  
23 Commission’s expertise plays in federal sentencing. Emphasizing the importance of

1 the Commission's national experience and empirical studies, in 2006, the Seventh  
2 Circuit asserted that "the sentencing guidelines represent 18 years of careful thought  
3 about appropriate sentences for federal criminal offenders." *United States v.*  
4 *Robinson*, 435 F.3d 699, 701 (7th Cir. 2006) (emphasis added). The sentencing  
5 guidelines have been utilized because the "Commission is uniquely qualified to  
6 conduct studies using its vast database, obtain the views and comments of various  
7 segments of the federal criminal justice community, review the academic literature,  
8 and report back to Congress in a timely manner." *See* U.S. Sentencing Commission,  
9 Fifteen Years of Sentencing: An Assessment of How Well the Federal Criminal  
10 Justice System is Achieving the Goals of Sentencing Reform, at xvii (2004).

11       However, the Commission has acknowledged that the goals of sentencing  
12 reform have not been fully achieved because "in some cases, the results of research  
13 and collaboration have been overridden or ignored . . . through enactment of  
14 mandatory minimums or specific directives to the Commission." *Id.* Courts  
15 generally assume that the guidelines are the product of careful study based on  
16 extensive empirical evidence. *See Rita v. United States*, 127 S.Ct. 2456, 2464-65  
17 (2007). However, the Supreme Court has recognized that "not all of the Guidelines  
18 are tied to this empirical evidence." *Gall v. United States*, 128 S.Ct. 586, 594 n.2.  
19 (2007); *see also Kimbrough v. United States*, 128 S.Ct. 558 (2007). The child  
20 pornography guidelines are precisely the type of flawed guidelines referenced in *Rita*  
21 and *Gall*.

1 The child-pornography sentencing guidelines, U.S.S.G. §§ 2G2.1-.2, like the  
2 drug guidelines at issue in *Kimbrough v. United States*, 552 U.S. 85 (2007),<sup>1</sup> are  
3 atypical in that they were not based on the Sentencing Commission's nationwide  
4 empirical study of criminal sentencing. "In the main, the Commission developed  
5 Guidelines sentences using an empirical approach based on data about past  
6 sentencing practices." *Kimbrough*, 128 S.Ct. at 567. But the guidelines for child-  
7 exploitation offenses were not crafted this way. Instead, "[m]uch like policymaking

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9 <sup>1</sup> In *Kimbrough*, the Supreme Court found that "[t]he crack cocaine  
10 Guidelines . . . do not exemplify the Commission's exercise of its characteristic  
11 institutional role" because the Commission looked to the mandatory minimum  
12 sentences set in the 1986 Act in formulating guideline ranges for crack cocaine  
13 offenses. *Kimbrough*, 128 S.Ct. at 574. The sentencing guidelines for crack  
14 offenses were less deserving of a district court's deference because the  
15 Commission did not formulate the crack/powder differential through its usual  
16 mechanism of conducting empirical research into sentencing outcomes.  
17 *Kimbrough*, 128 S.Ct. at 575. When the Commission blindly follows or exacerbates  
18 a congressional mandatory minimum with guidelines that are not based on  
19 empirical evidence or the Commission's experience, the courts are free to reject  
20 those guidelines. See *Kimbrough*, 128 S.Ct. at 567-68, 571-72, 574-75; *Gall*, 128  
21 S.Ct. at 594 and n.2.

1 in the area of drug trafficking, Congress has used a mix of mandatory minimum  
2 penalty increases and directives to the Commission to change sentencing policy for  
3 sex offenses.” U.S. Sentencing Comm’n, *Fifteen Years of Guidelines Sentencing:  
4 An Assessment of How Well the Federal Criminal Justice System is Achieving the  
5 Goals of Sentencing Reform* 72-73 (November 2004), available at  
6 [http://www.ussc.gov/15\\_year/15\\_year\\_study\\_full.pdf](http://www.ussc.gov/15_year/15_year_study_full.pdf).

7       The evolution of the child pornography guidelines demonstrates that it was  
8 driven by political concerns separate and apart from careful study by the  
9 commission. For the first three years of the Guidelines regime, the provisions of §  
10 2G2.2 were the result of careful study by the Sentencing Commission, devoid of  
11 serious interference by outside forces. *See* Troy Stabenow, *Deconstructing the Myth  
12 of Careful Study: A Primer on the Flawed Progression of the Child Pornography  
13 Guidelines* at 3-4. At that time, the offense of transporting, receiving or trafficking  
14 in child pornography had a base offense level of 13, with a two-level enhancement if  
15 the offense involved a minor under twelve years old and a five-level enhancement if  
16 it involved distribution (for less than \$100,000).

17       The Guidelines as a reflection of the careful consideration by the Sentencing  
18 Commission began to veer off the rails in 1990, when simple possession of  
19 pornography was criminalized by Congress. The Sentencing Commission enacted  
20 carefully considered responses. Certain members of Congress inserted legislation  
21 into an unrelated appropriations bill directing the Sentencing Commission to undo  
22 its careful amendments and make the applicable guidelines considerably harsher.

1 No debate was held on this legislation. When this amendment was considered in the  
2 House, the Chair of the Sentencing Commission strongly objected to it. The  
3 Amendment passed by a wide majority. This strong-arm, uninformed approach by  
4 Congress continued over the intervening years, thereby eviscerating the traditional  
5 role of the Sentencing Commission in conducting careful study based on empirical  
6 data in formulating the guidelines.

7 The child pornography guidelines have been generally enacted in response to  
8 harsh congressional mandatory minimums. *See United States v. Baird*, 2008 WL  
9 151258 (D. Neb. Jan. 11, 2008); *United States v. Shipley*, 2008 WL 2470001 (S.D.  
10 Iowa June 19, 2008); *United States v. Hanson*, 2008 WL 2486336 (E.D. Wis. June  
11 20, 2008). In 2003, two attorneys at the Department of Justice convinced a novice  
12 Congressman, Tom Feeney, to insert drastic changes to the child pornography  
13 Guidelines into an unrelated, popular bill, without notice to the Sentencing  
14 Commission. *See* Skye Phillips, *Protect Downward Departures: Congress and the*  
15 *Executive's Intrusion Into Judicial Independence*, 12 J.L. & Pol'y 947, 976-984  
16 (2004) (hereinafter "Phillips"). This additional component of the Protect Act  
17 drastically changed the statutory penalties for child pornography offenses including  
18 U.S.S.G. § 2G2.1. *See* U.S. Sentencing Guidelines Manual § 2G2.1, Amendment  
19 664, Supplement to Appendix C (Nov. 1, 2004 through Nov. 1, 2006).

20 The purpose of the Protect Act was to reconcile various bills, establish a  
21 nationwide Amber Alert system to be used in cases of child kidnaping, and to  
22 address virtual child pornography. *Phillips* at 967-984. As the legislation

1 progressed, Freshman Congressman Tom Feeney proposed an unrelated amendment  
2 to the bill that would directly amend various Guidelines and would bar downward  
3 departures not sponsored by government attorneys. *Id.*; *See also United States v.*  
4 *Detwiler*, 338 F.Supp.2d 1166, 1170-71 (D. Or. 2004). The technical amendments  
5 to 2G2.2 and 2G2.4 were a minor component of the sweeping changes contained in  
6 the amendment and no opportunity for study or research into their affect was  
7 possible. Representative Feeney later admitted he was just the “messenger” for two  
8 Justice Department officials who authored the provision and chose not to notify or  
9 consult the Sentencing Commission. *See Phillips, ante*, at 983 & n. 185. Debate on  
10 the Feeney amendment was limited to twenty minutes. Phillips, at 983 and n. 187.  
11 Despite objections by the Sentencing Commission, the Chairman of the House  
12 Committee on the Judiciary, the Judicial Conference of the United States, and the  
13 American Bar Association, that the proposed Feeney amendment was made without  
14 adequate review and analysis, the Protect Act became law on April 30, 2003.  
15 Phillips, at 990- 92, 991 n. 219.<sup>2</sup>

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16  
17 <sup>2</sup> Numerous members of Congress objected to these changes, and the  
18 procedure by which they were introduced, including Senators Ted Kennedy and  
19 Patrick Leahy. *Id* at n.215. Senator Leahy explained, “The substance of the Hatch-  
20 Sensenbrenner amendment – whether in the form that was voted on in conference,  
21 or in the form that was circulated after the conference adjourned – is just as  
22 outrageous as the way in which it was adopted. This amendment modifies in very  
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1 Contained in both the original Feeney Amendment and the final version of the  
2 Protect Act, was a direct amendment to U.S.S.G. §§ 2G2.2 and 2G2.4, adding up to  
3 a five-level increase depending on the number of images possessed. *See Protect Act*,  
4 Pub.L. 108-21, § 401(i)(1)(B),©. The Act also directly amended § 2G2.4 by adding  
5 an enhancement for “material that portrays sadistic or masochistic conduct.” *Id.* The  
6 Act directed the Commission to expand the range of the “pattern of abuse”  
7 enhancement to make it encompass single-victim, opportunity offenses commonly  
8 associated with the prosecution of Native Americans. *See U.S. Sentencing*  
9 *Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well*  
10 *the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*  
11 (2004), available at [http://www.ussc.gov/15\\_15year/15year.htm](http://www.ussc.gov/15_15year/15year.htm) at 73. Finally, the  
12 Protect Act also adjusted mandatory minimum sentences and statutory sentencing  
13 maximums for child pornography offenses. No research, study, body of experience,  
14 or rationale, was provided to justify the arbitrary specific offense enhancement  
15 amounts, nor the choice of the triggering quantities for the two to five point  
16 enhancement related to the number of images of child pornography. Nor was there

17  
18 limited ways the Feeney amendment, which was added to the bill on the House  
19 floor after only 20 minutes of debate. This far-reaching proposal will undermine  
20 the federal sentencing system and prevent judges from imposing just and  
21 responsible sentences.” *Id.*; *See also* 149 Cong. Rec. S5137-01, 5145 (daily ed.  
22 Apr. 10, 2003) (statement by Sen. Leahy). (Exh. A at 20-21).

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any justification provided for § 2G2.4(b)(4)'s new 4-level enhancement. The Protect  
 Act increased the mandatory minimum term of imprisonment from 10 to 15 years for  
 offenses related to the production of child pornography under 18 U.S.C. § 2251.  
 U.S. Sentencing Guidelines Manual § 2G2.1, Amendment 664, Supplement to  
 Appendix C (Nov. 1, 2004 through Nov. 1, 2006).

These dramatic changes to the guidelines do not result from reflective study,  
 nor conscientious debate in Congress, but the changes instead result from the actions  
 of two unknown authors within the Department of Justice. Instead, Congress  
 hijacked the authority and role of the Sentencing Commission for political gain. *See*  
 Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed*  
*Progression of the Child Pornography Guidelines* at 21-24. It seems that no  
 research, study, body of experience, or rationale, was provided to justify the drastic  
 increase in punishment for these types of offenses. Rather, it seems that these  
 changes were made as a knee-jerk response to be perceived as ‘tough on crime.’  
 This is analogous with the recently amended crack guidelines which also were not  
 developed under the empirical approach.

Since it was the Commission’s failure to exercise its “characteristic  
 institutional role” that persuaded the Supreme Court that district courts possess the  
 discretion to sentence below the crack guidelines based on policy disagreements, see  
*Kimbrough*, 128 S.Ct. at 575, sentencing judges possess the same discretion when  
 dealing with the child-exploitation guidelines.<sup>3</sup> This argument was developed by

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<sup>3</sup> For a more detailed analysis of the flaws in the sentencing guidelines  
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1 federal defender Troy Stabenow in a 2008 paper subsequently revised in 2009—  
 2 Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed*  
 3 *Progression of the Child Pornography Guidelines* (January 1, 2009). District courts  
 4 have repeatedly cited Stabenow’s article for the proposition that the child-  
 5 pornography guidelines’ lack of empirical support provides sentencing judges the  
 6 discretion to sentence below those guidelines based on policy disagreements with  
 7 them. *E.g.*, *United States v. Shipley*, 560 F.Supp.2d 739, 744-46 (S.D.Iowa 2008);  
 8 *United States v. Hanson*, 561 F.Supp.2d 1004, 1008-12 (E.D.Wis.2008); *United*  
 9 *States v. Baird*, 580 F.Supp.2d 889, 894-96 (D.Neb.2008); *United States v. Grober*,  
 10 595 F.Supp.2d 382 (D.N.J. 2008).

11 Several of the enhancements incorporated into § 2G2.2 – use of a computer,  
 12 material involving a pre-pubescent minor, number of images and material portraying  
 13 depictions of violence – are sources of significant unnecessary inflation in  
 14 possession cases. One of the many flaws with U.S.S.G. § 2G2.2 today is that a  
 15 common, first-time offender can chart at or near the statutory maximum, regardless  
 16 of Acceptance of Responsibility and Criminal History. These enhancements simply  
 17 do not account for the realities of today’s rapid pace of technological development  
 18 and the prominent and fundamental role computers play in all child pornography  
 19 cases. The results are illogical; Congress set the statutory range for first time

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20 relating to child pornography offenses, see Troy Stabenow, *Deconstructing the*  
 21 *Myth of Careful Study: A Primer on the Flawed Progression of the Child*  
 22 *Pornography Guidelines* (January 1, 2009) (Exh. A).

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1 distributors as five to twenty years. Congress could not have intended for a common  
2 first-time offender with no prior criminal history and no history of contact with  
3 minors to receive a sentence at or near the statutory maximum.

4 Computers are now used for any matter of mundane daily activities: buying a  
5 plane ticket, ordering a product, paying a bill. They also arguably provide the most  
6 common means of communication. Use of a computer for any purpose is, in this day  
7 and age, much more the rule rather than the exception. The 2010 U.S. Census shows  
8 that 78% of adults reported computer use in 2009, and 79% reported internet use.  
9 (See: <http://www.census.gov/compendia/statab/2010/tables/10s1121.pdf>). To rely  
10 on a factor that is mundane, common, and unexceptional as the basis for a two level  
11 enhancement means that the majority of cases will trigger the enhancement, which in  
12 turn means that for all intents and purposes the factor isn't actually an enhancement  
13 but is rather a core part of the offense. DOJ data from 2006 supports this  
14 supposition: in that year, 97% of child pornography defendants had used a computer.  
15 (See: <http://bjs.ojp.usdoj.gov/content/pub/pdf/fpcseo06.pdf>)

16 File-sharing networks (often called "peer to peer" or P2P) have become one of  
17 the most common means of accessing computer pornography. Because of the ease  
18 and speed with which voluminous files can be shared and the way most file-  
19 sharing networks operate, a member of a file-sharing network can, simply by joining  
20 a group, easily and readily obtain files or images that he neither desired nor realized  
21 he received. The member need not view each file contained in the bulk he received  
22 by joining the group, but each file still remains in the possession of that member.

1 The top quantity enhancement of 600 images is easily reached in most cases. This  
2 quantity is reached by simply possessing eight videos, which are counted as 75  
3 images each. Even where child pornography is sought, the requesting recipient has  
4 very little control over the quantity of images or the specific content. In the mass of  
5 files received there is frequently a file or multiple files that trigger the four level  
6 “S&M” or violence enhancement.

7 Almost all groups of child pornography include pre-pubescent images. A P2P  
8 file-share can rapidly transfer hundreds or even thousands of images to a member  
9 who was not intending receipt of anything close to that volume. The guidelines’  
10 maximum quantity enhancement—5 levels—is reached at 600 images, after just a  
11 single P2P session. (2G2.2(b)(7)(D)). Quantity enhancements begin at just 10  
12 images. (2G2.2(b)(7)(A)). Cases with less than hundreds of images are rarely before  
13 the court. Similarly, the 4-level enhancement for sadistic or masochistic or other  
14 depictions of violence, 2G2.2(b)(4), requires only one image that meets the  
15 definition, even in cases of hundreds or thousands of images. The P2P possessor has  
16 no way of filtering out the more offensive “pre-pubescent” or violent images from  
17 less offensive yet still “baseline” illegal images. Hence a P2P user can, in a single  
18 sitting, jump from a “simple possession” base of 18 (+ 2 for computer use, i.e. 20),  
19 to 31 (base, +2 for computer, +2 for pre-pubescent, +4 for S&M, +5 for over 600  
20 images, *an increase of 11 levels*, when the conduct – clicking a button – brings that  
21 increase without any special or individualized conduct by the defendant. By way of  
22 comparison, a level 17 (20 - 3 for acceptance), compared to a level 28 (31 - 3 for  
23

1 acceptance) at a history I is the difference between 24-30 months and 78-97 months.

2 The advisory guidelines are “the starting point and the initial benchmark” in  
 3 determining a sentence. *Gall*, 128 S.Ct. At 596. At sentencing, the district court  
 4 should first calculate the appropriate advisory guideline range and then decide  
 5 whether to impose a sentence within the range or outside it. Here, the initial  
 6 guideline calculation is not worth deference, based upon the political manner in  
 7 which the applicable guidelines have been reached, as opposed to the careful study  
 8 of empirical evidence typically employed by the Sentencing Commission. Rather,  
 9 the more appropriate basis for sentencing are the section 3553(a) factors, as  
 10 discussed herein.

### 11 12 **C. Treatment will provide an effective means of preventing recidivism**

13 Possession of child pornography involves neither actual contact with children  
 14 nor any further dissemination or promotion of the material. A societal fear exists  
 15 that those who view child pornography will quick and inevitable descent from  
 16 possession to contact offenses. Yet the empirical data of precisely the type upon  
 17 which it is the Commission’s mandate and practice to rely shows otherwise. There  
 18 is “accumulating evidence” not only that paraphilia diagnoses, including  
 19 pedophilia, ***do not predict any type of recidivism***, but that “there is ***no empirical***  
 20 ***support*** for a direct causal link between internet sex offending and the commission  
 21 of contact offenses” (Kingston et. al., *Comparing Indicators of Sexual Sadism as*  
 22 *Predictors of Recidivism among Adult Male Sexual Offenders*, J. Consulting and

1 Clinical Psychology, Vol. 78, Issue 4, 574-584 (2010) (emphasis added); Webb et.  
2 al., *Characteristics of Internet Child Pornography Offenders: A Comparison with*  
3 *Child Molesters*, 19 Sexual Abuse: J. Res. & Treatment 449, 451 (2007) (emphasis  
4 added)).

5 Studies examining the effectiveness of sex offender treatment in the 1990's  
6 produced mixed or inconsistent results, but systematic reviews conducted more  
7 recently indicate that certain sex offender treatment approaches can and do work.  
8 Specifically, cognitive-behavioral therapy and therapeutic communities have been  
9 shown to be effective in reducing recidivism.

10 In 1996, the GAO published a review of sex offender treatment research based  
11 on 22 other reviews covering 550 studies. Their analysis found no consensus among  
12 the reviews about what treatment works to reduce the recidivism of sex offenders.  
13 Cognitive-behavioral treatment was most often reported to be promising, while  
14 psychotherapy was generally viewed as not being effective. Because most of the  
15 reviews reported methodological problems, definitive conclusions about the efficacy  
16 of treatment could not be drawn.<sup>4</sup>

17 Gallagher et al. (1999) conducted a meta-analysis of 25 evaluations of sex  
18 offender treatment and found strong evidence that cognitive behavioral approaches  
19 with relapse prevention components are effective at reducing recidivism. Sex

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20 <sup>4</sup> General Accounting Office. (June 1996). *Sex offender treatment:*  
21 *Research results inconclusive about what works to reduce recidivism.* GAO 96-  
22 137. Washington, DC.

1 offenders treated with cognitive-behavioral/relapse prevention techniques  
2 recidivated at a rate 8 percentage points below that of comparison sex offenders. In  
3 2002, Hanson and his colleagues conducted a meta-analysis of 43 studies and found  
4 that treatment reduced sexual recidivism by 4.5 percentage points. A follow-up  
5 analysis based only on the more recent studies found a 7.5% reduction in sexual  
6 recidivism. Cognitive behavioral approaches again were most effective. Lösel and  
7 Schmucker's (2005) meta-analysis of 69 studies involving more than 22,000  
8 offenders found a 6% reduction in recidivism among offenders who received  
9 treatment.<sup>5</sup> Prentky et al. (2006) conducted a narrative review of treatment  
10 effectiveness studies and concluded that "the most reasonable estimate at this point  
11 is that treatment can reduce sexual recidivism over a five year period by between 5%  
12 and 8%."<sup>6</sup> A meta-analysis of 30 studies conducted by Luong and Wormith (2006)  
13 found that sex offenders who received any treatment recidivated at a significantly  
14 lower rate than sex offenders who did not receive treatment. The researchers  
15 reported that for every 100 untreated sex offenders who sexually recidivate, 82 sex

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17 <sup>5</sup> Lösel, F., and Schmucker, M. (2005). The effectiveness of treatment  
18 for sexual offenders: A comprehensive meta-analysis. *Journal of Experimental*  
19 *Criminology*, 1, 117-146.

20 <sup>6</sup> Prentky, R., Schwartz, B. and Burns-Smith, G. (2006). Treatment of  
21 Adult Sex Offenders. Applied Research Forum, National Online Resource Center  
22 on Violence Against Women. Page 5. Available at [www.vawnet.org](http://www.vawnet.org).



1 offenders who received any form of treatment will do so.<sup>7</sup> Again, cognitive-  
 2 behavioral approaches were associated with significant reductions in recidivism  
 3 whereas other treatment approaches were not.

4 Another study (Barnoski, 2006) examined the effectiveness of Washington's  
 5 Specialized Sex Offender Sentencing Alternative (SSOSA). Under SSOSA, certain  
 6 felony sex offenders are granted in lieu of imprisonment a special sentence that  
 7 involves some jail time, community supervision and outpatient treatment.<sup>8</sup> The  
 8 evaluation found that the five-year sexual and violent crime recidivism rates for  
 9 offenders granted a SSOSA were consistently lower than the rates for the other types  
 10 of sex offenders. Another group conducted a meta-analysis of six rigorous studies of  
 11 adult sex offender treatment with aftercare and found that these programs reduced  
 12 recidivism, on average, by 7%.<sup>9</sup>

13 Studies demonstrate that treatment works. In 2003, the Colorado Division of  
 14 Criminal Justice conducted an evaluation of the sex offender therapeutic community

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16 <sup>7</sup> Luong and Wormith (N.D.). Page 1.

17 <sup>8</sup> Barnoski, R. (January, 2006). Sex offender sentencing in Washington  
 18 State: Special sex offender sentencing alternative trends. Washington State  
 19 Institute for Public Policy, Olympia, WA.

20 <sup>9</sup> Aos, S., Miller, M. and Drake, E. (2006). *Evidence-based adult*  
 21 *corrections programs: What works and what does not*. Washington State Institute  
 22 for Public Policy, Olympia, WA.

1 at the Colorado Department of Corrections (DOC) (Lowden, et al., 2003). The  
2 following key findings emerged from the study:

- 3 • Participation in treatment was significantly associated with success on  
4 parole. An analysis of the parole completion/revocation rates of 1,585 sex  
5 offenders released to parole between 1993 and 2002 indicated that nearly half  
6 of the offenders who did not receive treatment were revoked back to prison.  
7 This rate was three times higher than the group that received both Phase I and  
8 Phase II treatment and two times higher than the group that only received  
9 Phase I treatment.
- 10 • The length of time that an offender participates in treatment was  
11 significantly related to positive outcomes after release from prison. Each  
12 additional month spent in the TC increased the likelihood of success upon  
13 release by 1% (12% per year).
- 14 • Sex offenders who did NOT have treatment and who were released on parole  
15 were at least eight times as likely to get arrested for a violent crime during the  
16 first year out than those who participated in TC treatment.
- 17 • The Colorado DOC's program for sex offenders, as it was implemented in  
18 2003, was found to effectively reduce recidivism.

19 The lesson learned from reviewing the literature in this area of study is that  
20 sex offender treatment can and does have significant positive effects. Treatment  
21 significantly lessens the risk of recidivism. A well-structured treatment program can  
22 have significant and long-lasting effects on its participating patients.

**D. A Guideline Sentence in this case will create disparity as the Guidelines are recognized as flawed nationwide**

Child pornography has been an understandable concern since at least the passage of the Protection of Children from Exploitation Act of 1977. (U.S. Sentencing Commission, History of Child Pornography Guidelines, 2009) Eradication of and punishment for child pornography remains necessary and legitimate congressional and societal focus. The guidelines applicable to possession of child pornography have been revised ten times since the promulgation of the first set of guidelines in 1987. While some revisions have been a response to the changing nature of visual medium and technology (i.e., the increased—and now almost totally exclusive—use of computers as opposed to paper or video material), most of the changes (increases to the offense level) have been based upon—indeed, required by—congressional mandates rather than sound empirical research and data. The Commission’s “characteristic institutional role” has been repeatedly superceded by Congress, putting at odds the application of the advisory guidelines while also meeting the “sufficient but not greater than necessary” approach of the sentencing statute.

Throughout the history of the child pornography guidelines, the Commission has diligently gathered empirical data on the subject. Congress has repeatedly applied a political response that ignores the Commission’s empirical data. Congress has required the Commission to implement changes in direct contradiction to the Commission’s recommendations. In 1991 and 1996, the Commission expressly objected by letter and report (respectively) to what it considered Congress’s

1 unreasonable and ill-considered directives to increase sentences for child  
2 pornography. In what was widely considered a rebuke for having stood its ground,  
3 Congress in 2003 denied the Commission the opportunity even to offer objections  
4 and instead congressionally enhanced the child pornography guidelines without any  
5 notice to or consultation with the Commission.

6       The § 2G2.2 sentencing enhancements cobbled together through this process  
7 routinely result in Guidelines projections near or exceeding the statutory maximum,  
8 even in run-of-the-mill cases. The base offense level for distribution of child  
9 pornography, which in 1991 was 13, has been gradually increased to 22 as the  
10 Commission has attempted to square the Guidelines with Congress's various  
11 directives. *See* United States Sentencing Commission, *The History of the Child*  
12 *Pornography Guidelines, supra*, at 19. On top of that, many of the § 2G2.2  
13 enhancements apply in nearly all cases. Of all sentences under § 2G2.2 in 2009,  
14 94.8% involved an image of a prepubescent minor (qualifying for a two-level  
15 increase pursuant to § 2G2.2(b)(2)), 97.2% involved a computer (qualifying for a  
16 two-level increase pursuant to § 2G2.2(b)(6)), 73.4% involved an image depicting  
17 sadistic or masochistic conduct or other forms of violence (qualifying for a four-  
18 level enhancement pursuant to § 2G2.2(b)(4)), and 63.1% involved 600 or more  
19 images (qualifying for a five-level enhancement pursuant to § 2G2.2(b)(7)(D)). *See*  
20 United States Sentencing Commission, *Use of Guidelines and Specific Offense*  
21 *Characteristics for Fiscal Year 2009*, available at  
22  
23

1 [http://www.ussc.gov/gl\\_freq/09\\_glinexgline.pdf](http://www.ussc.gov/gl_freq/09_glinexgline.pdf).<sup>10</sup> An ordinary first-time offender is  
 2 therefore likely to qualify for a sentence of at least 168 to 210 months, rapidly  
 3 approaching the statutory maximum, based solely on sentencing enhancements that  
 4 are all but inherent to the crime of conviction (without accounting for acceptance of  
 5 responsibility.

6 Courts across the country have come to the conclusion that § 2G2.2 is “a  
 7 provision that...is seriously flawed and accordingly entitled to little respect.” *United*  
 8 *States v. Donaghy*, 2010 WL 2605375 (E.D.Wis. 2010), collecting many such cases;  
 9 *see also United States v. Burns*, 2009 WL 3617448 (N.D. Ill. 2009); *United States v.*  
 10 *Dorvee*, 604 F.3d 84, (2nd Cir. 2010) (both pointing out the many flaws in advisory  
 11 guideline § 2G2.2 and the lack of empirical data which distinguish this guideline  
 12 from others promulgated by the Commission.) Because the Guidelines do not  
 13 distinguish between these “run-of-the-mill” offenders and the most dangerous  
 14 offenders, the “result is fundamentally incompatible with § 3553(a).” *Dorvee* at 186.  
 15 See also, *United States v. Grober*, 2010 U.S. App. LEXIS 21980, (3rd Cir. 2010)  
 16 (citing *Dorvee* with approval and listing district court cases from around the country  
 17

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18 <sup>10</sup> While this number may seem high, the large number of images  
 19 possessed by individuals convicted of child pornography likely stems from the fact  
 20 that the Guidelines count each video as 75 images. See Application Note 4,  
 21 U.S.S.G. § 2G2.2. It is also worth noting that 96.6% of defendants received at least  
 22 a two-level enhancement based on the number of images possessed.  
 23

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 and Sentencing Memorandum

1 rejecting the advice of guideline 2G2.2).

2       The United States Sentencing Commission conducted a survey of United  
3 States District Judges in 2010. (*See* Exh. A). The results of that survey are striking.  
4 For distribution cases (which had the same mandatory minimum sentence Mr.  
5 Tejada faced initially on Count 1), the majority of judges surveyed (57%), found that  
6 the mandatory minimum sentence of five years was appropriate for those convicted  
7 of that offense. (Exh. A at Question 1). A significant minority (37%) found that  
8 mandatory minimum sentence to be *too high*. (Exh. A at Question 1). A total of  
9 94% of judges thus found the mandatory minimum to be appropriate or too high.  
10 Only 6% of judges found it too low. (Exh. A at Question 1).

11       When asked, 44% of judges either strongly or somewhat agreed that the safety  
12 valve exception should be expanded to apply to distribution of child pornography  
13 offenses. (Exh. A. at Question 2). 15% were neutral, with a minority of 41% either  
14 somewhat or strongly disagreeing with expanding the safety valve exception. (Exh.  
15 A at Question 2). 30% of judges found the guideline ranges for distribution to be  
16 too high (Exh. A at Question 8). 35% of judges felt that distribution defendants  
17 should be eligible for straight probation, probation with community or home  
18 confinement, or split sentencing of imprisonment and community or home  
19 confinement. (Exh. A at Question 11). Perhaps most importantly, 33% of judges  
20 stated that statutory mandatory minimums were the leading factor in creating  
21 sentencing disparities. (Exh. A at Question 16).

22       Based on this survey (Exh. A), it is clear that on a nationwide basis, the child

1 pornography mandatory minimum and guidelines are recognized by many, if not  
2 most, judges as a significant sentencing problem. Certainly, if the mandatory  
3 minimum is sufficient or even too severe, a guideline range which exceeds the  
4 mandatory minimum is greater than necessary.

5 Adherence to the Guidelines results in virtually no distinction between the  
6 sentences for defendants like Mr. Tejeda, and the sentences for the more aggravated  
7 offenders who, for example, distribute child pornography for pecuniary gain and  
8 who fall in higher criminal history categories. This result is fundamentally  
9 incompatible with § 3553(a). By concentrating all offenders at or near the statutory  
10 maximum, § 2G2.2 eviscerates the fundamental statutory requirement in § 3553(a)  
11 that district courts consider “the nature and circumstances of the offense and the  
12 history and characteristics of the defendant” and violates the principle, reinforced in  
13 *Gall*, that courts must guard against unwarranted similarities among sentences for  
14 defendants who have been found guilty of dissimilar conduct. *See Gall*, 552 U.S. at  
15 55 (affirming a sentence where “it is perfectly clear that the District Judge  
16 considered the need to avoid unwarranted disparities, but also considered the need to  
17 avoid unwarranted *similarities* among other co-conspirators who were not similarly  
18 situated” (emphasis in original)).

19 The irrationality in § 2G2.2 is easily illustrated by a simple example. Had Mr.  
20 Tejeda actually engaged in abusive sexual contact with a minor under the age of  
21 twelve, his applicable Guidelines range could have been identical or less, pursuant to  
22 U.S.S.G. § 2A3.4. This illogical result demonstrates that the guideline range called

1 for in this case is too high.

2  
3 **E. Collateral Consequences for a Registered Sex Offender render a**  
4 **Guidelines range sentence greater than necessary**

5 The Court may also consider, both for purposes of public safety and in  
6 considering an appropriate sentence, the significant collateral consequences of a sex  
7 offense conviction. Regardless of the length of Mr. Tejeda's sentence, he will re-  
8 enter society forever branded with a label unique among convicted felons, a "sex  
9 offender," required by both state and federal law to register. It is, of course, Mr.  
10 Tejeda's own behavior that has put him in this position, and he accepts that fact. But  
11 it is undeniable that life as a registered sex offender (a registration that makes no  
12 distinction beyond length of registration between Mr. Tejeda who looked at images  
13 on a computer, and those who created the images or those who actually molest  
14 children) is measurably more compromised than life after a conviction for any other  
15 type of offense.

16 Sex offender registration is the scarlet letter of contemporary society.  
17 Housing, already a struggle for any other type of convicted felon, can prove  
18 "difficult, if not impossible," for registered sex offenders, who are often forced upon  
19 the mercy of their families or social services. Employment is hard to find, especially  
20 for those sex offenders who, like Mr. Tejeda and do not have a specialized trade or  
21 vocational. The supervision limitations on computer use and internet access further  
22 limit employment opportunities. The social stigma of registration all but ensures a  
23 lonely, isolated existence shrouded in shame.

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1 The fact is that Mr. Tejeda, upon completing the incarcerative portion of his  
2 sentence, will only have begun to taste the extent of his punishment. As a member of  
3 that subset of defendants already subject to an excessive mandatory minimum and  
4 guideline range, he will on top of his sentence face a lifetime of distinct collateral  
5 consequences.

6  
7 **III. Conclusion**

8 As discussed herein, the applicable guidelines are fundamentally flawed and  
9 not worthy of any deference whatsoever. A sentence of 48 months, pursuant to the  
10 plea agreement, is sufficient but not greater than necessary.

11 Based on the availability and effectiveness of treatment, and the other  
12 collateral consequences, as discussed herein, Mr. Tejeda requests the Court sentence  
13 him to the mandatory minimum term of supervised release, which is five years.

14 Dated: July 15, 2014

15  
16 Respectfully Submitted,

17 *s/ Matthew Campbell*  
18 Matthew Campbell, WA 38696  
19 Federal Defenders of  
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21 10 North Post, Suite 700  
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**CERTIFICATE OF SERVICE**

I hereby certify that on July 15, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: STEPHANIE LISTER, Assistant United States Attorney.

*s/ Matthew Campbell*

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# EXHIBIT A

Notice of Review of PSR  
and Sentencing Memorandum

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# **Results of Survey of United States District Judges January 2010 through March 2010**



**UNITED STATES SENTENCING COMMISSION**  
**June 2010**

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# **Results of Survey of United States District Judges January 2010 through March 2010**



**William K. Sessions III**  
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**Ruben Castillo**  
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*Commissioner*

**Isaac Fulwood, Jr.**  
*(ex officio)*

**Jonathan J. Wroblewski**  
*(ex officio)*

**Results of Survey of United States District Judges  
January 2010 through March 2010**

**Introduction**

The Sentencing Reform Act of 1984<sup>1</sup> significantly changed the manner in which offenders convicted of federal crimes are punished by eliminating the system of indeterminate sentencing then in use, including the use of parole, and instituting in its place a system of determinate sentencing. Through the SRA, Congress created the United States Sentencing Commission as an independent agency in the judicial branch of government.

The SRA provided that the principal purposes of the Commission are to —

(1) establish sentencing policies and practices for the federal criminal justice system that —

- incorporate the purposes of sentencing (*i.e.*, just punishment, deterrence, incapacitation, and rehabilitation);
- provide certainty and fairness in meeting the purposes of sentencing by avoiding unwarranted disparity among offenders with similar criminal characteristics convicted of similar criminal conduct, while permitting sufficient judicial flexibility to take into account relevant aggravating and mitigating factors; and
- reflect, to the extent practicable, advancement in the knowledge of human behavior as it relates to the criminal justice process; and

(2) develop the means of measuring the degree to which sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing.<sup>2</sup>

The Commission accomplishes the first purpose principally through the promulgation of federal sentencing guidelines, informed in that effort by its ongoing research and data analysis activities. The Commission's research and data collection, and its dissemination of the results of that activity, also contribute significantly to accomplishing the second purpose.

In providing the authority by which the Commission could accomplish these purposes, Congress also authorized the Commission to collect and disseminate information regarding the effectiveness of sentences imposed; assist and serve in a consulting capacity to the federal courts, departments, and agencies in the development, maintenance, and coordination of sound sentencing practices; and make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters.<sup>3</sup>

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<sup>1</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2019 (1987) (hereinafter SRA).

<sup>2</sup> 28 U.S.C. § 991(b).

<sup>3</sup> See 28 U.S.C. § 995(a)(12), (16), (20).

To mark the 25th anniversary of the SRA, the Commission sought information from a wide range of persons and groups with a role in the federal criminal justice system about sentencing practices in general and the federal sentencing guidelines in particular. The federal sentencing guidelines were in effect as a mandatory system for 16 years and have now been in effect as an advisory system for five years, which is sufficient time for federal judges to have assessed the merits and shortcomings of the advisory system.<sup>4</sup> Over a ten-month period, the Commission conducted a series of regional public hearings on federal sentencing practices and the guidelines. The Commission held seven hearings and received testimony from more than 135 witnesses. Among the witnesses were United States circuit and district judges, representatives of the United States Department of Justice, federal public defenders and other defense counsel, probation officers, researchers and other academics, law enforcement officials, and representatives of public interest and advocacy groups.

Although these hearings were extensive, the Commission sought to provide an opportunity to receive broader input on many of the issues raised at the hearings from as many district judges as possible, and to capture this input in a systematized and quantifiable way. To do this, the Commission undertook a survey of all United States district judges concerning their views and opinions on sentencing practices. The Commission contracted with Abt Associates, a professional research firm, and its affiliate, Abt SRBI, a professional survey firm (collectively “Abt”), to conduct the survey.<sup>5</sup> This is the first survey of federal judges to elicit their views about federal sentencing under an advisory guidelines system. On several prior occasions, the Commission has used surveys to canvass federal judges and others about their opinions on federal sentencing issues.<sup>6</sup>

The Commission’s 2010 survey asked questions grouped into five broad areas: (1) statutory and structural sentencing issues; (2) sentencing hearings; (3) guideline application issues; (4) departures; and (5) general assessments. Judges were provided an opportunity to offer written comments in addition to or to expand upon their answers to the survey questions. A copy of the survey is attached to this report as Appendix A.

### **How the Survey Was Conducted**

The Commission reviewed its prior surveys of federal judges and developed a series of draft questions for the 2010 survey. The draft questions were provided to Abt, which modified

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<sup>4</sup> United States v. Booker, 543 U.S. 220 (2005).

<sup>5</sup> Abt was selected to conduct this survey after a competitive procurement process. The Commission decided to engage the services of a professional research and survey firm in order to draw upon the expertise of such a firm in survey research and design, as well as its ability to distribute, receive, and tabulate a large number of survey responses in a short period of time. By using an outside research organization for this purpose, the Commission was able to maintain the confidentiality of all survey participants yet also ensure that responses were received from a representative group of judges.

<sup>6</sup> LINDA DRAZGA MAXFIELD, UNITED STATES SENTENCING COMMISSION, FINAL REPORT: SURVEY OF ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES (2003); MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, FED. JUDICIAL CTR., THE U.S. SENTENCING GUIDELINES, RESULTS OF THE FEDERAL JUDICIAL CENTER’S 1996 SURVEY (1997); UNITED STATES SENTENCING COMMISSION, A NATIONAL SAMPLE SURVEY, PUBLIC OPINION ON SENTENCING FEDERAL CRIMES (1995).

the questions for a survey format and organized them into a structured questionnaire. On January 4, 2010, Abt sent an electronic mail to all district court judges inviting them to complete the questionnaire online and providing an Internet link to the questionnaire. On January 13, Abt sent a follow-up reminder invitation also by electronic mail. Abt sent a paper copy of the questionnaire to each judge who did not complete the survey online by January 20 and to any other judge who requested to receive the report in paper format, along with a cover letter from the chair of the Commission asking the judge to complete the survey. Judges who received the paper survey could complete it online or by mailing the paper questionnaire to Abt.

On February 17, Abt mailed another paper copy of the survey and the cover letter to those judges who had not completed the survey in either format. Also on February 17, Abt sent an additional reminder by electronic mail to judges who had not responded to the survey. Abt staff again made reminder telephone calls on February 23–24.

During the survey period, approximately 50 judges asked to be excluded from the survey because they were no longer active judges, had sentenced no criminal offenders in the last two years, or for other reasons. Those judges have been omitted from the data analysis presented in this report.

Judges submitted their survey responses directly to Abt, either through the website Abt created for the survey or by mailing the paper questionnaire directly to Abt. All responses were kept confidential. In order to further maintain confidentiality, Abt did not provide any information to the Commission as to which judges had or had not completed the survey but only the overall number of judges who responded. In its final report to the Commission about its work, Abt provided only aggregate data to the Commission as to the responses to the survey. No individual responses were provided apart from the written comments that some judges included in their survey response. Abt did not identify the names of the judges who made these comments.

### **Response Rate to the Survey**

The survey period formally ended on March 1, 2010; however, all responses delivered to Abt by March 31, 2010, were included in its report to the Commission. Abt reported to the Commission that, of the 942 judges to whom the survey was sent and who did not ask to be excluded from the survey, 639 responded to Abt. This represents a 67.8 percent response rate to the survey.

The judges who responded to the survey presided over a significant portion of the cases in which federal offenders were sentenced during fiscal years 2008 and 2009. During this two-year period, district court judges imposed original sentences on 146,511 individual federal criminal offenders.<sup>7</sup> Based on an analysis performed by Abt, the 639 judges who responded to the survey sentenced 116,183, or 79 percent, of these offenders. Of the 50 judges who sentenced

---

<sup>7</sup> This number represents offenders convicted of felonies and Class A misdemeanors under federal law.



the most individual offenders during the two-year period from fiscal year 2008 to fiscal year 2009, the response rate was even higher. Of the judges in this group, 43 responded to the survey. This represents an 86 percent response rate by these judges. Together, these 43 judges account for 31 percent of all offenders sentenced nationally during that period.

By grouping all serving district court judges into four groups for analytical purposes by the number of offenders on whom each judge imposed sentence during the two-year period, Abt was able to determine whether the judges who are most experienced in criminal matters responded to the survey at a significant rate. Abt's analysis shows that, in fact, the more criminal cases a judge handled, the more likely he or she was to respond to the survey. For example, among the 25 percent of all judges who sentenced the most offenders during the two-year period, 80 percent responded to the survey, a rate higher than the overall response rate to the survey. The judges in this group account for 62 percent of all offenders sentenced during fiscal years 2008 and 2009. The response rate for judges in the middle two groups (half of all the judges) ranged from 67 to 69 percent. Together, the judges in these groups imposed sentence on 34 percent of all individual offenders sentenced during this period. The response rate among the judges in the last group of judges, the 25 percent of judges sentencing the fewest offenders during the two-year period, remained substantial, although lower, at 46 percent. The judges in this group imposed sentence on four percent of all offenders sentenced during the two-year period.

### **Survey Results**

Below is a series of tables that set out the results of the Commission's survey of district court judges. These results present the answers given to the specific questions posed in the survey instrument.

## I. Statutory and Structural Issues

### Question 1. Mandatory Minimums

**Table 1. Was the mandatory minimum sentence generally appropriate for these offenses?**

	Appropriate	Too Low	Too High				
	Percent			Total	Number	N/A	Missing
All Offenses With A Mandatory Minimum	38%	0%	62%	100%	513	65	61
Drug Trafficking							
<i>Heroin</i>	55	2	43	100%	495	121	23
<i>Powder Cocaine</i>	52	4	44	100%	585	32	22
<i>Crack Cocaine</i>	23	1	76	100%	593	25	21
<i>Methamphetamine</i>	53	4	44	100%	531	84	24
<i>Marijuana</i>	43	3	54	100%	530	86	23
Firearms Offenses							
<i>Under 18 USC § 924(c)</i>	61	2	38	100%	584	32	23
<i>Under 18 USC § 924(e)</i>	59	2	39	100%	566	52	21
Child Pornography							
<i>Production</i>	67	10	23	100%	510	113	16
<i>Distribution</i>	57	6	37	100%	555	69	15
<i>Receipt</i>	26	2	71	100%	585	40	14
Other Child Exploitation Offenses	68	6	26	100%	420	195	24
Aggravated Identity Theft	54	18	27	100%	487	130	22

Note. "Number" refers to respondents who answered question with other than a "N/A" response. "N/A," or "not applicable," means that respondent had not sentenced a defendant convicted post-Kimbrough/Gall. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.

## Question 2. Safety Valve

**Table 2. The statutory safety valve should be expanded to include:**

	Strongly Agree	Somewhat Agree	Neutral	Somewhat Disagree	Strongly Disagree	Total	Number	Missing
	Percent							
Drug trafficking offenders who have 2 or 3 criminal history points ( <i>i.e.</i> , those in Criminal History Category II)	30%	36%	12%	14%	8%	100%	630	9
Drug trafficking offenders who have 4, 5, or 6 criminal history points ( <i>i.e.</i> , those in Criminal History Category III)	10	12	18	26	34	100%	630	9
All Offenses With a Mandatory Minimum	40	29	13	10	8	100%	625	14
Drug Trafficking	44	32	12	8	4	100%	613	26
Firearms Offenses								
<i>Under 18 USC § 924(c)</i>	31	28	15	16	10	100%	615	24
<i>Under 18 USC § 924(e)</i>	30	27	16	15	12	100%	615	24
Child Pornography								
<i>Production</i>	20	14	16	20	31	100%	618	21
<i>Distribution</i>	25	19	15	18	23	100%	618	21
<i>Receipt</i>	43	28	13	7	8	100%	618	21
Other Child Exploitation Offenses	19	15	28	15	23	100%	608	31
Aggravated Identity Theft	23	23	26	15	13	100%	617	21

Note. "Number" refers to respondents who answered question. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.

### Question 3. Opinions about Possible Statutory Changes and Structural Changes to the Guidelines

Table 3. Which response best reflects your view of the following statements?

	Percent				Number		
	Strongly Agree	Somewhat Agree	Neutral	Somewhat Disagree	Strongly Disagree	Total	Missing
Congress should amend 28 USC § 994(b)(2) to allow broader ranges on the Sentencing Table.	24%	27%	36%	10%	4%	100%	14
The sentencing guidelines should be "de-linked" from statutory mandatory minimum sentences ( <i>i.e.</i> , the guideline ranges should be set by the Commission independently from mandatory minimum sentences).	34	24	19	14	8	100%	11
The number of categories in the loss table in USSG §2B1.1 should be decreased by broadening the monetary ranges.	14	23	37	19	6	100%	13
The number of drug quantity ranges in the Drug Quantity Table in USSG §2D1.1 should be decreased by broadening the quantity ranges.	14	21	33	24	8	100%	15
The number of criminal history categories in the Sentencing Table should be decreased.	4	6	24	42	25	100%	12
The number of offense levels in the Sentencing Table should be decreased.	6	10	27	39	18	100%	12
Some of the more generic SOC adjustments ( <i>e.g.</i> , weapon use, victim injury) in Chapter Two of the <i>Guidelines Manual</i> should be moved to Chapter Three.	3	12	77	5	3	100%	18

Note. "Number" refers to respondents who answered question. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.

## Question 4. "Good Time"

**Table 4. The maximum amount of good time credit allowable should be:**

	Percent	Number
Unchanged	65	
Reduced	3	
Increased	31	
Total	100	
Number		625
Missing		14

Note. "Number" refers to respondents who answered question. "Missing" means that respondent did not provide any information about this question.

## II. Sentencing Hearings

### Question 5. Relevant Conduct

**Table 5. What should be considered "relevant conduct" for purposes of sentencing?**

	Proportion of Respondents Indicating Agreement Percent	Number
All reasonably foreseeable acts and omissions of others in furtherance of a jointly undertaken criminal activity?	79	639
Conduct that was charged in a count that was later dismissed?	31	639
Uncharged conduct that is presented at trial or admitted by the defendant in court?	77	639
Uncharged conduct referenced only in the presentence report?	32	639
Acquitted conduct?	16	639

**Question 6. Standard of Proof****Table 6. What do you think should be the standard of proof for each type of fact to be established at sentencing?**

	Preponderance	Clear and Convincing	Beyond a Reasonable Doubt	Total	Number	Missing
	Percent					
Facts establishing the base offense level	69%	14%	17%	100%	630	9
Facts supporting adjustments to the base offense level	75	17	8	100%	630	9
Facts supporting departures	85	13	2	100%	631	8
Facts supporting variances	87	11	2	100%	630	9

Note. "Number" refers to respondents who answered question. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.

## Question 7. Crime Victims

Table 7. Which response best reflects your view of the following statements?

	Percent				Total	Number	Missing
	Strongly Agree	Somewhat Agree	Neutral	Somewhat Disagree			
The interests of crime victims generally are adequately protected under current federal sentencing procedures.	34%	45%	9%	10%	2%	626	13
Presentence reports should be required to include information a victim wishes to be included in the report.	19	35	16	17	13	630	9
Portions of presentence reports, including descriptions of the offense conduct and guideline calculations, should be disclosed to victims.	9	26	20	24	22	631	8
Victims should have the opportunity to comment on the presentence report, including on disputed guidelines factors, before the sentence is imposed.	5	17	10	31	37	630	9
Congress should amend the restitution statutes to more broadly define the term "victim" to include persons who suffer any harm, injury, or loss that would have not occurred but for the defendant's crime.	10	36	20	21	13	630	9
Congress should amend the restitution statutes to more broadly provide for compensation to victims, including for emotional distress or other consequential harm or loss that the victim suffered as a result of the defendant's crime.	7	23	18	27	24	628	11
Courts should have the authority to order restitution to victims in all cases.	26	40	20	7	7	627	12

Note. "Number" refers to respondents who answered question. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.

### III. Guideline Application

#### Question 8. Appropriateness of Guideline Ranges

**Table 8. Is the guideline range generally appropriate for each following type of offense?**

	Yes	No—Too Low	No—Too High	Total	Number	N/A	Missing
	Percent						
Murder	89%	9%	2%	100%	143	474	22
Manslaughter	78	21	1	100%	107	504	28
Assault	83	12	5	100%	282	330	27
Fraud	65	24	10	100%	594	20	25
Larceny/Theft/Embezzlement	70	21	9	100%	570	47	22
Drug Trafficking							
<i>Heroin</i>	65	3	32	100%	475	150	14
<i>Powder Cocaine</i>	65	6	30	100%	599	26	14
<i>Crack Cocaine</i>	28	2	70	100%	592	34	13
<i>Methamphetamine</i>	60	6	34	100%	539	84	16
<i>Marijuana</i>	54	5	41	100%	553	72	14
<i>Ecstasy</i>	65	4	30	100%	430	193	16
<i>Oxycodone</i>	64	6	29	100%	384	235	20
Child Pornography							
<i>Production</i>	72	13	16	100%	450	173	16
<i>Distribution</i>	62	8	30	100%	530	93	16
<i>Receipt</i>	28	3	69	100%	570	72	14
<i>Possession</i>	26	3	70	100%	576	46	17
Other Child Exploitation Offenses	72	12	16	100%	348	258	33
Firearms	70	7	23	100%	591	29	19
Alien Smuggling	67	21	12	100%	395	225	19
Illegal Reentry into the U.S.	55	11	34	100%	592	32	15

Note. "Number" refers to respondents who answered question with other than a "N/A response." "N/A", or "not applicable," means that respondent had not sentenced a defendant convicted post-Kimbrough/Gall. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.



## Question 9. Role in the Offense

**Table 9. Which answer best reflects your view of the following statements?**

	Strongly Agree	Somewhat Agree	Neutral	Somewhat Disagree	Strongly Disagree	Total	Number	Missing
	Percent							
The distinction between a "minor" and "minimal" participant should be explained more clearly.	31%	35%	23%	9%	2%	100%	624	15
The distinction between an "organizer/leader" and a "manager/supervisor" should be explained more clearly.	28	38	23	8	2	100%	625	14
The range of adjustments based on role in the offense should be increased (i.e., allow adjustments for role in the offense greater than 4 levels).	15	32	28	19	6	100%	623	16

Note. "Number" refers to respondents who answered question. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.

## Question 10. Criminal History Calculation

Table 10. Which response best reflects your view of the following statements?

	Strongly Agree		Somewhat Agree		Neutral		Somewhat Disagree		Strongly Disagree		Total	Number	Missing
	Agree	Agree	Agree	Agree	Agree	Agree	Disagree	Disagree					
The combined impact of "recency" points and "status" points under USSG §4A1.1(d) and (e) should be reduced.	9%	19%	55%	12%	5%	100%	619	20					
Misdemeanor careless or reckless driving should always be excluded from criminal history computations.	17	25	19	30	8	100%	627	12					
Misdemeanor driving without a license or with a revoked or suspended license should always be excluded from criminal history computations.	17	28	16	29	9	100%	627	12					
Misdemeanor insufficient funds check should always be excluded from criminal history computations.	16	23	22	33	6	100%	629	10					
Misdemeanor disorderly conduct or disturbing the peace should always be excluded from criminal history computations.	11	19	21	40	8	100%	627	12					
Misdemeanor loitering offenses should always be excluded from criminal history computations.	25	30	19	22	4	100%	628	11					
Misdemeanor public intoxication offenses should always be excluded from criminal history computations.	19	29	19	27	6	100%	628	11					
Offenses committed prior to age 18 should always be excluded from criminal history computations.	10	18	13	39	21	100%	628	11					
Sentences resulting from tribal court convictions should be included in criminal history computations.	12	24	45	10	9	100%	623	16					
The applicable time periods for counting prior offenses under USSG §4A1.2(e) (i.e., the "decay factor") should be shortened.	4	15	31	32	18	100%	627	12					
The career offender provisions at USSG §§4B1.1 and 4B1.2 should be amended to apply only to offenders described in 28 USC § 994(h).	9	22	43	18	9	100%	624	15					

Note. "Number" refers to respondents who answered question. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.

## Question 11. Availability of Sentence Types

Table 11. Do you believe the following sentences should be made *more* available for each offense?

	Straight Probation	Percent of Judges Answering Affirmatively		Split Sentencing of Imprisonment and Community or Home Confinement	Number
		1%	5%		
Murder					639
Manslaughter	2	3	17		639
Assault	8	12	33		639
Fraud	14	22	43		639
Larceny/Theft/Embezzlement	15	24	44		639
Drug Trafficking					
Heroin	8	11	28		639
Powder Cocaine	9	14	33		639
Crack Cocaine	9	13	34		639
Methamphetamine	9	13	32		639
Marijuana	19	22	40		639
Ecstasy	11	15	32		639
Oxycodone	10	14	32		639
Child Pornography					
Production	4	5	17		639
Distribution	5	8	22		639
Receipt	15	20	39		639
Possession	19	23	41		639
Other Child Exploitation Offenses	6	7	18		639
Firearms	3	11	33		639
Alien Smuggling	6	9	22		639
Illegal Reentry into the U.S.	14	11	21		639

Note. "Number" refers to respondents who answered question.

## Question 12. Supervised Release

Table 12a. Which response best reflects your view of the following statements?

	Appropriate	Too Low	Too High	Total	Number	Missing
	Percent	Percent	Percent	Percent		
The number of cases in which the guidelines provide for supervised release generally is:	87%	7%	7%	100%	628	11
The lengths of the terms of supervised release terms provided by the guidelines generally are:	87	7	6	100%	631	8
The ranges of punishment for violations of supervised release provided by the policy statements in Chapter Seven, Part B of the <i>Guidelines Manual</i> generally are:	77	16	7	100%	629	10

	Strongly Agree	Somewhat Agree	Neutral	Somewhat Disagree	Strongly Disagree	Total	Number	Missing
	Percent	Percent	Percent	Percent	Percent	Percent		
The minimum terms of supervised release provided in USSG §5D1.2 should be eliminated.	10%	21%	35%	22%	13%	100%	624	15

Note. "Number" refers to respondents who answered question. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.

## IV. Departures and Variances

### Question 13. Factors to Consider at Sentencing

Table 13. Relevance of various characteristics at sentencing.

	Is Ordinarily Relevant to Within-Range Determination	Is Ordinarily Relevant to Departure and/or Variance Consideration	Never Relevant	Number
	Percent of Judges Responding Affirmatively	Percent of Judges Responding Affirmatively	Percent of Judges Responding Affirmatively	
Age	57%	67%	0%	639
Education	46	48	5	639
Vocational Skills	41	41	6	639
Mental Condition	65	79	0	639
Emotional Condition	51	60	3	639
Physical Condition	51	64	1	639
Drug Dependence	50	49	5	639
Alcohol Dependence	48	47	5	639
Gambling Addiction	38	39	10	639
Employment Record	62	65	2	639
Family Ties and Responsibilities	57	62	2	639
Community Ties	46	49	5	639
Dependence on Criminal Livelihood	56	55	12	639
Stress Related to Military Service	48	64	4	225*
Civic, Charitable, or Public Service	52	60	2	639
Employment-Related Contributions	43	47	9	639
Prior Good Works	55	62	3	639
Lack of Guidance as a Youth	49	49	7	639
Disadvantaged Upbringing	48	50	7	639
Diminished Capacity	66	80	0	639
Voluntary Disclosure of Offense	70	74	0	639
Post-Sentencing Rehabilitative Efforts	51	57	6	639
Post-Offense Rehabilitative Efforts	61	70	1	639
Aberrant Behavior	64	74	1	639
Exceptional Efforts to Fulfill Restitution Obligations	62	75	1	639
Undue Influence Related to Affection, Relationship, or Fear of Other Offender(s)	57	68	3	639

Note. \*Data for "stress related to military service" was collected from judges who responded on paper questionnaires and was erroneously omitted from the online survey. "Number" refers to respondents who answered question. Percents do not sum to 100% because many judges responded affirmatively to more than one condition.

## Question 14. Departure Provisions

**Table 14. Which response best reflects your view of the following reasons for not relying on departure provisions?**

	Percent	Number	Missing
Not applicable/no such cases in past two years	13%	637	2
The <i>Guidelines Manual</i> does not contain a departure provision that adequately reflects the reason for the sentence outside the guideline range.	76	556	0
Departure policy statements in the <i>Guidelines Manual</i> were too restrictive.	65	556	0
Circuit case law regarding departures was too restrictive.	35	556	0
Departure policy statements are inconsistent with the factors under 18 USC § 3553(a).	41	556	0
Departures are subject to heightened procedural requirements (e.g., notice requirements under Fed. R. Crim. P. 32(h)).	28	556	0
Departures are subject to stricter appellate review than variances.	38	556	0

Note. "Number" refers to respondents who indicated their agreement to any of the statements. "Percent" refers to the proportion of that number who indicated their agreement to the corresponding statement. "Missing" refers to respondents who provided no opinion about any of the statements in question 14. Thirteen percent (or 81) of the 637 non-missing judges indicated that this question was not applicable because they had no such cases during past two years. These 81 judges were therefore excluded from the sample for the remaining statements, leaving 556 judges. Because judges were asked to check any statement that they agreed with, percents sum to more than 100%.

## Question 15. Substantial Assistance

Table 15. For each statement, which response best reflects your view?

	Strongly Agree	Somewhat Agree	Neutral	Somewhat Disagree	Strongly Disagree	Total	Number	Missing
Congress should amend 18 USC § 3553(e) to authorize judges to sentence a defendant below the applicable statutory mandatory minimum to reflect a defendant's substantial assistance, even if the government does not make a motion.	25%	29%	11%	18%	17%	100%	633	6
The Commission should amend USSG §5K1.1 to authorize judges to sentence below the applicable guideline range to reflect a defendant's substantial assistance, even if the government does not make a motion.	25	29	12	18	17	100%	632	7
The Federal Rules of Criminal Procedure should be amended to authorize judges to reduce a defendant's sentence under Rule 35(b) if the defendant, after sentencing, provides the required assistance, even if the government does not make a motion.	22	26	15	21	17	100%	633	6
The Commission should amend USSG §5K1.1 to provide additional guidance regarding the extent to which a court may depart under that provision (i.e., provide specific guidance on the number of offense levels recommended for departures based on the factors enumerated in USSG §5K1.1).	14	28	20	20	19	100%	630	9
The Commission should amend USSG §5K1.1 to provide additional guidance regarding evaluation of the nature and extent of the assistance provided.	15	30	22	18	15	100%	632	7
The Commission should amend USSG §5K1.1 to provide additional guidance regarding evaluation of the results obtained through the assistance provided.	15	27	23	20	16	100%	632	7
In determining the extent of a reduction below the statutory mandatory minimum under 18 USC § 3553(e) or Fed. R. Crim. P. 35(b), the court's consideration should not be limited to the nature of the defendant's substantial assistance but also should include consideration of the factors at 18 USC § 3553(a).	33	30	14	13	11	100%	631	8

Note. "Number" refers to respondents who answered question. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.



## V. General Assessment

### Question 16. Sentencing Disparities

Table 16. Ranking of factors thought to contribute to disparities.

	Percent of Respondents					Number	Missing
	1	2	3	4	5		
Statutory Mandatory Minimums	33%	12%	7%	6%	5%	598	41
Charging Decisions	32	25	9	8	6	598	41
Judicial Discretion	11	7	7	10	13	598	41
Regional Differences	7	9	12	10	16	598	41
Substantial Assistance Practices under USSG §5K1.1	5	10	16	13	9	598	41
Early Disposition Programs ("fast track")	4	5	7	4	5	598	41
Plea Agreements: Fact Bargaining	4	9	8	9	8	598	41
Variances	3	6	6	8	10	598	41
Binding Plea Agreements under Fed. R. Crim. P. 11 (c)(1)(C)	3	9	8	5	6	598	41
Substantial Assistance Practices under 18 USC § 3553(e)	3	4	9	6	4	598	41
Substantial Assistance Practices under Fed R. Crim P. 35	2	1	5	4	4	598	41
Differing Circuit Case Law (e.g., different interpretations of "crime of violence")	2	3	4	7	9	598	41
Non Government-Sponsored Departures	1	2	3	2	4	598	41
Lack of Substantive Appellate Reasonableness Review	1	1	2	2	4	598	41

Note. "Number" refers to respondents who ranked at least one factor. "Missing" includes respondents who did not rank any factor listed in question 16. "Percent of respondents" refers to the proportion of responding judges (598) who ranked the factor according to their perceived order of significance (1 through 5 only). Judges frequently assigned the same rank (e.g., 1) to several different factors, so that column percents do not sum to 100%. Row percents do not sum to 100% because some judges did not assign a 1 through 5 rank to each listed factor. For example, 37% of the judges did not rank statutory mandatory minimums within the top five factors, which may be interpreted either as their having no opinion about this factor or that they believed that it ranks below 5 in significance.



## Question 17. General Assessment of Guidelines and Federal Sentencing

**Table 17. Which response best reflects your view of the following statements?**

	Strongly Agree	Somewhat Agree	Neutral	Somewhat Disagree	Strongly Disagree	Total	Number	Missing
	Percent							
Overall, the federal sentencing guidelines have reduced unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct.	32%	46%	6%	9%	7%	100%	629	10
Overall, the federal sentencing guidelines have increased certainty in meeting the purposes of sentencing.	30	46	9	10	6	100%	630	9
Overall, the federal sentencing guidelines have increased fairness in meeting the purposes of sentencing.	22	45	10	14	10	100%	630	9

Note. "Number" refers to respondents who answered question. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.

## Question 18. Reporting of Sentencing Data

**Table 18. Which response best reflects your view of the statement about reporting sentencing data?**

	Strongly Agree	Somewhat Agree	Neutral	Somewhat Disagree	Strongly Disagree	Total	Number	Missing
	Percent							
The Commission should report judge-specific sentencing data as a means to promote transparency in sentencing.	10%	14%	23%	15%	38%	100%	634	5

Note. "Number" refers to respondents who answered question. "Missing" means that respondent did not provide any information about this question. Percents may not sum to 100% due to rounding.

## Question 19. Purposes of Sentencing

**Table 19. Which of the following sentencing systems do you think best achieves the purposes of sentencing?**

	Percent	Number
No guidelines, such as the system in effect before the federal sentencing guidelines became effective in 1987.	8%	
Mandatory guidelines, such as the system in effect before the Supreme Court's decision in <i>United States v. Booker</i> , 543 U.S. 220 (2005).	3	
The current advisory guidelines system.	75	
A system of mandatory guidelines that comply with the Sixth Amendment (e.g., with facts supporting sentencing enhancements found by a jury beyond a reasonable doubt or admitted by the defendant) and have broader sentencing ranges than currently exist, coupled with fewer statutory mandatory minimum sentencing provisions.	14	
Total	100%	
Number		634
Missing		5

Note. "Number" refers to respondents who answered question. "Missing" means that respondent did not provide any information about this question.

**APPENDIX A  
SURVEY INSTRUMENT**

**2010 Survey of Judges on the Federal Sentencing Guidelines**



## 2010 Survey of Judges on The Federal Sentencing Guidelines

### Purpose of Survey:

Upon the 25th anniversary of the Sentencing Reform Act of 1984, the United States Sentencing Commission is seeking information from members of the federal judiciary about sentencing practices in general and the federal sentencing guidelines in particular. During the past year, the Commission has been conducting a series of regional public hearings on federal sentencing practices and the guidelines and has heard from various stakeholders in the federal criminal justice system, including several federal district and appellate judges. This survey is intended to provide an opportunity to receive broader input from as many federal district judges as possible. The Commission intends to issue a report with possible recommendations for statutory and guideline changes in part based on the findings from the hearings and this survey.

The questions in this survey address a wide variety of sentencing issues and will be divided into the following categories: (1) statutory and structural sentencing issues; (2) sentencing hearings; (3) guideline application issues; (4) departures and variances; and (5) general assessments. You also will be given an opportunity at the end of the questionnaire to offer comments. Statutes cited in the survey are included in this packet for your convenience.

### Confidentiality:

Information obtained about you from this questionnaire will be held in confidence; you will not be identified in any presentation of the results. Only your confidential study identification number will appear on these questionnaire pages. Identification numbers will be used solely to track response rates and allow for reminders to those judges who do not initially respond. The results of the survey will be reported only in the aggregate. Geographical differences in results may be reported, but responses from individual judges will not be identified.

### Directions:

- Please fill in the circles completely and do not use check marks.
- Please use a soft lead pencil in case you wish to change an answer.
- When you have completed the questionnaire, please return it in the enclosed postage-paid envelope to: **2010 Survey of Judges, c/o Abt SRBI, Inc.  
55 Wheeler Street; Cambridge, MA 02138.**
- If you have any questions about the survey, please call the Commission's general counsel, Kenneth Cohen at 202-502-4523.

Thank you for taking the time to complete this survey. Your input is important to the Commission.



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## I. Statutory and Structural Issues

1. Consider cases you have sentenced that involved a statutory mandatory minimum provision. Indicate below whether you feel the mandatory minimum sentence was generally appropriate, generally too low, or generally too high for the following types of offenses. (Please mark "N/A" for "not applicable" if you have not sentenced a defendant convicted of the offense post-Kimbrough/Gall.)

	Appropriate	Too Low	Too High	N/A
All offenses with a Mandatory Minimum	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Drug Trafficking				
Heroin	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Powder Cocaine	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Crack Cocaine	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Methamphetamine	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Marijuana	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Firearms Offenses				
under 18 U.S.C. § 924 (c)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
under 18 U.S.C. § 924 (e)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Child Pornography				
Production	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Distribution	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Receipt	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other Child Exploitation Offenses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Aggravated Identity Theft	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>



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2. Under 18 U.S.C. § 3553(f), often referred to as the "safety valve," a court must impose a sentence without regard to statutory mandatory minimum penalties for certain drug trafficking offenses if certain criteria are met. Below is a list of statements about possible changes to the statutory safety valve. For each statement, fill in the circle that best reflects your view.

	Strongly Agree	Somewhat Agree	Neutral	Somewhat Disagree	Strongly Disagree
The statutory safety valve should be expanded to include drug trafficking offenders who have 2 or 3 criminal history points (i.e., those in Criminal History Category II).	①	②	③	④	⑤
The statutory safety valve should be expanded to include drug trafficking offenders who have 4, 5, or 6 criminal history points (i.e., those in Criminal History Category III).	①	②	③	④	⑤
<b>A safety valve provision should be provided for the following types of offenses:</b>					
All offenses with a mandatory minimum	①	②	③	④	⑤
Drug Trafficking	①	②	③	④	⑤
Firearms Offenses					
under 18 U.S.C. § 924 (c)	①	②	③	④	⑤
under 18 U.S.C. § 924 (e)	①	②	③	④	⑤
Child Pornography					
Production	①	②	③	④	⑤
Distribution	①	②	③	④	⑤
Receipt	①	②	③	④	⑤
Other Child Exploitation Offenses	①	②	③	④	⑤
Aggravated Identity Theft	①	②	③	④	⑤



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**3. Below is a list of statements about possible statutory changes and structural changes to the guidelines. For each statement, fill in the circle that best reflects your view.**

	Strongly Agree	Somewhat Agree	Neutral	Somewhat Disagree	Strongly Disagree
Congress should amend 28 U.S.C. § 994(b)(2) to allow broader ranges on the Sentencing Table.	①	②	③	④	⑤
The sentencing guidelines should be "de-linked" from statutory mandatory minimum sentences (i.e., the guideline ranges should be set by the Commission independently from mandatory minimum sentences).	①	②	③	④	⑤
The number of categories in the loss table in USSG §2B1.1 should be decreased by broadening the monetary ranges.	①	②	③	④	⑤
The number of drug quantity ranges in the Drug Quantity Table in USSG §2D1.1 should be decreased by broadening the quantity ranges.	①	②	③	④	⑤
The number of criminal history categories in the Sentencing Table should be decreased.	①	②	③	④	⑤
The number of offense levels in the Sentencing Table should be decreased.	①	②	③	④	⑤
Some of the more generic SOC adjustments (e.g., weapon use, victim injury) in Chapter Two of the <i>Guidelines Manual</i> should be moved to Chapter Three.	①	②	③	④	⑤

**4. Under 18 U.S.C. § 3624(b), offenders serving a term of imprisonment of more than one year may receive credit toward the service of that sentence if the offender displays exemplary compliance with institutional disciplinary regulations. Under current law, offenders may receive up to 54 days of such "good time" credit each year.**

**Do you believe the maximum amount of good time credit allowable should be:**  
(Please mark only one choice)

- ☐ Unchanged  
☐ Reduced  
☐ Increased



## II. Sentencing Hearings

**5. In your view, what should be considered "relevant conduct" for purposes of sentencing?**  
**Please mark all that apply.**

- ☐ All reasonably foreseeable acts and omissions of others in furtherance of a jointly undertaken criminal activity.
- ☐ Conduct that was charged in a court that was later dismissed.
- ☐ Uncharged conduct that is presented at trial or admitted by the defendant in court.
- ☐ Uncharged conduct referenced only in the Presentence Report.
- ☐ Acquitted conduct.

**6. Please indicate what you think the standard of proof should be for each type of fact to be established at sentencing.**

	Preponderance	Clear and convincing	Beyond a reasonable doubt
Facts establishing the base offense level	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Facts supporting adjustments to the base offense level	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Facts supporting departures	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Facts supporting variances	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**7. Below is a list of statements about possible changes relating to how federal sentencing protects the interests of crime victims. For each statement or possible change, fill in the circle that best reflects your view.**

	Strongly Agree	Somewhat Agree	Neutral	Somewhat Disagree	Strongly Disagree
The interests of crime victims generally are adequately protected under current federal sentencing procedures.	①	②	③	④	⑤
Presentence reports should be required to include information a victim wishes to be included in the report.	①	②	③	④	⑤
Portions of presentence reports, including descriptions of the offense conduct and guidelines calculations, should be disclosed to victims.	①	②	③	④	⑤
Victims should have the opportunity to comment on the presentence report, including on disputed guideline factors, before the sentence is imposed.	①	②	③	④	⑤
Congress should amend the restitution statutes to more broadly define the term "victim" to include persons who suffer any harm, injury, or loss that would have not occurred but for the defendant's crime.	①	②	③	④	⑤
Congress should amend the restitution statutes to more broadly provide for compensation to victims, including for emotional distress or other consequential harm or loss that the victim suffered as a result of the defendant's crime.	①	②	③	④	⑤
Courts should have the authority to order restitution to victims in all cases.	①	②	③	④	⑤



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### III. Guideline Application

8. Considering cases in which you have sentenced defendants in the last two years (i.e., since the Supreme Court's decisions in *Kimbrough v. United States*, 552 U.S. \_\_\_, 128 S. Ct. 558 (Dec. 11, 2007), and *Gall v. United States*, 552 U.S. \_\_\_, 128 S. Ct. 586 (Dec. 11, 2007)), indicate if you felt the applicable guideline range was generally appropriate, generally too low, or generally too high for the following types of offenses. (Please mark "N/A" for "not applicable" if you have not sentenced a defendant convicted of the offense post-Kimbrough/Gall.)

	Appropriate	Too Low	Too High	N/A
Murder	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Manslaughter	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Assault	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Fraud	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Larceny/Theft/Embezzlement	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Drug Trafficking				
Heroin	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Powder Cocaine	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Crack Cocaine	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Methamphetamine	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Marijuana	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Ecstasy	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Oxycodone	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Child Pornography				
Production	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Distribution	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Receipt	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Possession	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other Child Exploitation Offenses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Firearms	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Alien Smuggling	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Illegal Reentry into the U.S.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

9. Below is a list of statements about possible changes to the guidelines concerning role in the offense (USSG §3B1.1 (Aggravating Role) and §3B1.2 (Mitigating Role)). For each statement, fill in the circle that best reflects your view.

	Strongly Agree	Somewhat Agree	Neutral	Somewhat Disagree	Strongly Disagree
The distinction between a "minor" and "minimal" participant should be explained more clearly.	①	②	③	④	⑤
The distinction between an "organizer/leader" and a "manager/supervisor" should be explained more clearly.	①	②	③	④	⑤
The range of adjustments based on role in the offense should be increased (i.e., allow adjustments for role in the offense greater than 4 levels).	①	②	③	④	⑤



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**10. Below is a list of statements about possible changes relating to how the Criminal History Category is calculated under Chapter Four of the *Guidelines Manual*. For each statement, fill in the circle that best reflects your view.**

	Strongly Agree	Somewhat Agree	Neutral	Somewhat Disagree	Strongly Disagree
The combined impact of "recency" points and "status" points under USSG §4A1.1(d) and (e) should be reduced.	①	②	③	④	⑤
Misdemeanor careless or reckless driving should always be excluded from criminal history computations.	①	②	③	④	⑤
Misdemeanor driving without a license or with a revoked or suspended license should always be excluded from criminal history computations.	①	②	③	④	⑤
Misdemeanor insufficient funds check should always be excluded from criminal history computations.	①	②	③	④	⑤
Misdemeanor disorderly conduct or disturbing the peace should always be excluded from criminal history computations.	①	②	③	④	⑤
Misdemeanor loitering offenses should always be excluded from criminal history computations.	①	②	③	④	⑤
Misdemeanor public intoxication offenses should always be excluded from criminal history computations.	①	②	③	④	⑤
Offenses committed prior to the age eighteen should always be excluded from criminal history computations.	①	②	③	④	⑤
Sentences resulting from tribal court convictions should be included in criminal history computations.	①	②	③	④	⑤
The applicable time periods for counting prior offenses under USSG §4A1.2(e) (i.e., the "decay factor") should be shortened.	①	②	③	④	⑤
The career offender provisions at USSC §§4B1.1 and 4B1.2 should be amended to apply only to offenders described in 28 U.S.C. § 994(h).	①	②	③	④	⑤



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**11. The sentencing guidelines are required by statute to provide a means to determine the type of sentence to impose: probation, a fine, or a term of imprisonment. Accordingly, the Sentencing Table is divided into zones that determine the availability of the type of guideline sentence to impose. Please indicate whether you believe the following types of alternative sentences should be made more available for each offense type. For each offense type, fill in the circle for each type of sentence, if any, that you believe should be made more available. If you do not think a particular type of sentence should be made more available, leave the circles blank.**

	Straight Probation	Probation with Community or Home Confinement	Split Sentencing of Imprisonment and Community or Home Confinement
Murder	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Manslaughter	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Assault	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Fraud	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Larceny/Theft/Embezzlement	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Drug Trafficking			
Heroin	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Powder Cocaine	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Crack Cocaine	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Methamphetamine	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Marijuana	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Ecstasy	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Oxycodone	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Child Pornography			
Production	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Distribution	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Receipt	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Possession	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other Child Exploitation Offenses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Firearms	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Alien Smuggling	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Illegal Reentry into the U.S.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**12. Below is a list of questions and statements about possible changes relating to supervised release. For each question or statement, fill in the circle that best reflects your view.**

	Appropriate	Too Low	Too High
The number of cases in which the guidelines provide for supervised release generally is...	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The lengths of the terms of supervised release terms provided by the guidelines generally are...	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The ranges of punishment for violations of supervised release provided by the policy statements in Chapter Seven, Part B of the <i>Guidelines Manual</i> generally are...	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

  

	Strongly Agree	Somewhat Agree	Neutral	Somewhat Disagree	Strongly Disagree
The minimum terms of supervised release provided in USSG §5D1.2 should be eliminated.	①	②	③	④	⑤



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#### IV. Departures and Variances

13. For each offender characteristic listed below, fill in the appropriate circle to indicate each way in which you think this factor should be considered at sentencing. Fill in as many circles as needed in each row to express your views.

Policy Statement where applicable	Characteristic	Ordinarily relevant to within-range determination	Not ordinarily relevant to within-range determination	Ordinarily relevant to departure and/or variance consideration	Not ordinarily relevant to departure and/or variance consideration	Never relevant
5H1.1	Age	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
5H1.2	Education	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
5H1.2	Vocational Skills	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
5H1.3	Mental Condition	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
5H1.3	Emotional Condition	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
5H1.4	Physical Condition	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
5H1.4	Drug Dependence	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
5H1.4	Alcohol Dependence	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
5H1.4	Gambling Addiction	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
5H1.5	Employment Record	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
5H1.6	Family Ties and Responsibilities	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
5H1.6	Community Ties	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
5H1.9	Dependence on Criminal Livelihood	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
	Stress Related to Military Service	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
5H1.11	Civic, Charitable, or Public Service	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
5H1.11	Employment-related Contributions	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
5H1.11	Prior Good Works	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
5H1.12	Lack of Guidance as a Youth	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
5H1.12	Disadvantaged Upbringing	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
5K2.13	Diminished Capacity	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
5K2.16	Voluntary Disclosure of Offense	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
5K2.19	Post-Sentencing Rehabilitative Efforts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
	Post-Offense Rehabilitative Efforts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
5K2.20	Aberrant Behavior	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
	Exceptional Efforts to Fulfill Restitution Obligations	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
	Undue Influence related to affection, relationship, or fear of other offender(s)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>



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**14. Considering cases in which you have sentenced defendants in the last two years (i.e., since the Supreme Court's decisions in *Kimbrough v. United States*, 552 U.S. \_\_\_, 128 S. Ct. 558 (Dec. 11, 2007), and *Gall v. United States*, 552 U.S. \_\_\_, 128 S. Ct. 586 (Dec. 11, 2007)), and in which the sentence imposed constituted a variance from the applicable guideline range, indicate the reason why you chose not to rely on a departure provision in the *Guidelines Manual*. Please select all that apply. (Please mark "N/A for not applicable if you have not imposed a sentence that constituted a variance post-Kimbrough/Gall.)**

- ☐ N/A
- ☐ The *Guidelines Manual* does not contain a departure provision that adequately reflects the reason for the sentence outside the guideline range.
- ☐ Departure policy statements in the *Guidelines Manual* were too restrictive.
- ☐ Circuit case law regarding departures was too restrictive.
- ☐ Departure policy statements are inconsistent with the factors under 18 U.S.C. § 3553(a).
- ☐ Departures are subject to heightened procedural requirements(e.g., notice requirements under Fed. R. Crim. P. 32(h)).
- ☐ Departures are subject to stricter appellate review than variances.

**15. Below is a list of statements and/or possible changes relating to substantial assistance. For each statement or possible change, fill in the circle that best reflects your view.**

	Strongly Agree	Somewhat Agree	Neutral	Somewhat Disagree	Strongly Disagree
Congress should amend 18 U.S.C. § 3553(e) to authorize judges to sentence a defendant below the applicable statutory mandatory minimum to reflect a defendant's substantial assistance, even if the government does not make a motion.	①	②	③	④	⑤
The Commission should amend USSG §5K1.1 to authorize judges to sentence below the applicable guideline range to reflect a defendant's substantial assistance, even if the government does not make a motion.	①	②	③	④	⑤
The Federal Rules of Criminal Procedure should be amended to authorize judges to reduce a defendant's sentence under Rule 35(b) if the defendant, after sentencing, provides the required assistance, even if the government does not make a motion.	①	②	③	④	⑤
The Commission should amend §5K1.1 to provide additional guidance regarding the extent to which a court may depart under that provision (i.e., provide specific guidance on the number of offense levels recommended for departures based on the factors enumerated in USSG 5K1.1).	①	②	③	④	⑤
The Commission should amend §5K1.1 to provide additional guidance regarding evaluation of the nature and extent of the assistance provided.	①	②	③	④	⑤
The Commission should amend §5K1.1 to provide additional guidance regarding evaluation of the results obtained through the assistance provided.	①	②	③	④	⑤
In determining the extent of a reduction below the statutory mandatory minimum under 18 U.S.C. § 3553(e) or Fed. R. Crim. P. 35(b), the court's consideration should not be limited to the nature of the defendant's substantial assistance but also should include consideration of the factors at 18 U.S.C. § 3553(a).	①	②	③	④	⑤



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## V. General Assessment

**16. To the extent, if any, you believe unwarranted sentencing disparities exist, indicate the 5 most significant contributors from the following list of factors in rank order (1 indicates the most significant contributor; 5 indicates the 5<sup>th</sup> most significant contributor). Please select only 5 from the list below.**

	Rank 1 thru 5
Statutory mandatory minimums	<input type="text"/>
Charging decisions	<input type="text"/>
Plea agreements	<input type="text"/>
Binding plea agreements under Fed. R.Crim.P.11 (c)(1)(C)	<input type="text"/>
Fact bargaining	<input type="text"/>
Substantial assistance practices	<input type="text"/>
Under 18 U.S.C. § 3553(e)	<input type="text"/>
Under USSG §5K1.1	<input type="text"/>
Under Fed. R. Crim. P. 35	<input type="text"/>
Early disposition programs ("fast track")	<input type="text"/>
Judicial Discretion	<input type="text"/>
Non-government-sponsored departures	<input type="text"/>
Variances	<input type="text"/>
Lack of substantive appellate reasonableness review	<input type="text"/>
Differing circuit case law (e.g., different interpretations of "crime of violence")	<input type="text"/>
Regional differences	<input type="text"/>

**17. Below is a list of statements regarding federal sentencing and the guidelines in general. For each statement, fill in the circle that best reflects your view.**

	Strongly Agree	Somewhat Agree	Neutral	Somewhat Disagree	Strongly Disagree
Overall, the federal sentencing guidelines have reduced unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct.	①	②	③	④	⑤
Overall, the federal sentencing guidelines have increased certainty in meeting the purposes of sentencing.	①	②	③	④	⑤
Overall, the federal sentencing guidelines have increased fairness in meeting the purposes of sentencing.	①	②	③	④	⑤



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**18. Below is a statement regarding the reporting of federal sentencing data. Fill in the circle that best reflects your view.**

	Strongly Agree	Somewhat Agree	Neutral	Somewhat Disagree	Strongly Disagree
The Commission should report judge-specific sentencing data as a means to promote transparency in sentencing.	①	②	③	④	⑤

**19. Which of the following sentencing systems do you think best achieves the purposes of sentencing? Please mark only one choice.**

- ☐ No guidelines, such as the system in effect before the federal sentencing guidelines became effective in 1987.
- ☐ Mandatory guidelines, such as the system in effect before the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005).
- ☐ The current advisory guidelines system.
- ☐ A system of mandatory guidelines that comply with the Sixth Amendment (e.g., with facts supporting sentencing enhancements found by a jury beyond a reasonable doubt or admitted by the defendant) and have broader sentencing ranges than currently exist, coupled with fewer statutory mandatory minimum sentencing provisions.

**20. Clarification and/or Comments**

The Commission welcomes all comments that you believe will help the Commission in its analysis of how the current guidelines system is meeting the statutory purposes of sentencing. You are also encouraged to provide your thoughts regarding the statutory definitions of the purposes of sentencing, problem areas you are experiencing with sentences under the guidelines, research areas you would like to see the Commission address or any other topic you wish to raise. *Attach additional paper if needed.*

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Thank you for taking the time to complete this questionnaire. Your input is important to the Commission. Please mail this completed questionnaire in the postage-paid envelope as soon as possible. Please return questionnaire to: **2010 Survey of Judges, c/o Abt SRBI, Inc. 55 Wheeler Street; Cambridge, MA 02138**



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